FILED
MAR 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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RELEVANT DOCKET ENTRIES

3-2-72	Complaint
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11-6-72	Answers of Everett Turner to interrogatories
11-16-72	Opposition of defendants to motion for summary judgement
3-9-73	District Court Memorandum and Order granting plaintiffs motion for summary judgement
3-15-73	Injunction order
5-7-73	Notice of Appeal by defendants

APPLICABLE STATUTES AND REGULATIONS

Federal Coal Mine Health and Safety Act of 1969, section 109(a); 30 U.S.C. section 819(a)

PENALTIES

Sec. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which

were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

TITLE 30–MINERAL RESOURCES

Chapter I–Bureau of Mines, Department of the Interior

SUBCHAPTER O–COAL MINE HEALTH AND SAFETY

PART 100–CIVIL PENALTIES FOR VIOLATIONS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

JANUARY 14, 1971.

Sec.

100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Liability for civil penalties; policy.
100.4 Procedures for assessment of civil penalties; protest procedures.

Appendix A–Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91-173).

§100.0 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effort on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§100.3 Liability for civil penalties; policy.

(a) *Withdrawal orders.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that leads to the issuance of an Order of Withdrawal, for example:

(1) A violation that creates an imminent danger;

(2) A repeated unwarrantable failure violation; and,

(3) A violation that is not abated in the reasonable time specified by the Bureau of Mines for total abatement.

The amount of the penalty for each such violation will not be more than $10,000.

(b) *Other violations*–(1) *Serious violations.* (i) A civil penalty will be proposed in accordance with the procedures established herein for each serious violation. The amount of the penalty for each such violation will not be more than $10,000.

(ii) For these purposes, a "serious violation" will be deemed to exist if there is a substantial probability that death or serious physical harm to the miners could result from a condition which exists, or from one or more practices which have been adopted or are in use.

(2) *Nonserious violations.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that is specifically determined not to be of a serious nature. The amount of the penalty, if any, for each such violation, will not be more than $10,000.

(3) *Absence of fault.* No civil penalty will be proposed for either a serious or nonserious violation if it is determined that the operator (i) did not, and could

not with the exercise of reasonable diligence know of the presence of the violation, or (ii) did not and could not have available to him at the time of the inspection the equipment, material, personnel or technology required to avoid the violation. Each such determination will be documented in writing and will set forth the specific conditions and reasons that justify such a determination.

§ 100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b)(1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether

the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15 working days from the date of receipt of the Proposed Order of Assessments to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violations, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 100 of the Act. If a hearing is requested, the protest must so state.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

(i)(1) Where the operator or miner requests formal adjudication of the assessment penalty under section 109 of the Act, the Assessment Officer shall forward the matter to the Associate Solicitor for Mine Health and Safety who shall file a petition to assess penalty with the Office of Hearings and Appeals of the Department of the Interior.

(2) The petition shall be served on the operator or miner who shall then answer the petition and be afforded an opportunity for a public hearing.

(3) The Office of Hearings and Appeals shall thereafter issue an order, based on Findings of Fact and Conclusions of Law.

(4) In assessing a penalty, the Office of Hearings and Appeals may redetermine the amount of the civil penalty for each violation in any amount not to exceed $10,000.

APPENDIX A

GUIDELINES FOR ASSESSMENT OF PENALTIES

Type of violations	*Penalty Range*
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000–$10,000
B. Other Withdrawal Orders	$1,000– $5,000
C. Serious Violations	$100– $1,000
D. Nonserious Violations	$25– $500
2. Miners:	
Smoking or the carrying of smoking materials, matches, or lighters	$25– $250

NOTE: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc.71–748 Filed 1-15-71; 9:47 am]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action
No. _____

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, P. O. Box 254
Richlands, Virginia;

COOK BRANCH MINING CO., INC.
Virgie, Kentucky 41572

KARST ROBBINS COAL CO.
Louellen, Kentucky 40853;

OXFORD MINING COMPANY
Coalgood, Kentucky 40818;

ROCCO COALS, INC.
Coalgood, Kentucky 40818;

BELMON COALS, INC.
Coalgood, Kentucky 40818;

PUCKETT COAL CO.
Coalgood, Kentucky 40818;

MORETZ MINING COMPANY
Coalgood, Kentucky 40818

NEECE MINING COMPANY
Colson, Kentucky 41809;

BANKS MINING CO., INC.
Colson, Kentucky 41809;

BUCHANAN COAL CORP.
Big Rock, Virginia 24603;

LARK COAL COMPANY
Big Rock, Virginia 24603;

BLACK WATCH MINE #3
Conaway, Virginia 24611;

BLACK DIAMOND FUEL COMPANY
Conaway, Virginia 24614;

THACKER COAL COMPANY
Stacey, Virginia 24616;

B & H COAL CO.
Tazewell, Virginia 24651;
REGIONAL COAL CO.
Crummies Creek, Kentucky 40821

DAY COAL CO., INC.
Isom, Kentucky 41824;

A & E COAL CO.
Colson, Kentucky 41809;

CEDAR GROVE COAL CO., INC.
Hartley, Kentucky 41532;

TALL BOY COAL CO.
Kite, Kentucky 41828;

JEAN COAL CO.
Millstone, Kentucky 41838;

E & K COAL COMPANY
Cody, Kentucky 41808;

PERRY COUNTY COAL COMPANY
Cody, Kentucky 41808

HUB COAL CO.
Cody, Kentucky 41808;

BETTY B COAL CO.
Clintwood, Virginia 24228;

DONNA KAY COAL CO.
Whitesburg, Kentucky 41858;

K & J COAL CO.
Southdown, Kentucky 41815;

POLE COAL CO.
Crown, Kentucky 41811;

PIONEER COAL CO.
Hazard, Kentucky 41701;

FLAX COAL CO.
Littcarr, Kentucky 41834;

ANDERSON COAL CORP.
Fork Ridge, Tennessee;

HARLAN FUEL CO.
Harlan, Kentucky 40831;

DIXIE FUEL CO.
Harlan, Kentucky 40831;

GRAY'S KNOB COAL CO.
Harlan, Kentucky 40831;

KENTUCKY ELKHORN COAL CO.
Virgie, Kentucky 41501;

LOVILLIA COAL CO.
Melrose, Iowa 52569, and

BIG BEN COAL CO.
Melrose, Iowa 52569
Plaintiffs

v.

ROGERS C. B. MORTON, Secretary of the Interior of the United States, Department of the Interior, Washington, D.C.;

ELBURT G. OSBORN, Director of the United States Bureau of Mines, Department of the Interior, Washington, D.C.;

EDWARD FAILOR, Chief, Office of Assessments and Enforcement Compliance, United States Bureau of Mines, Department of the Interior, Washington, D.C.
and
EVERETT TURNER, Assessment Officer, United States Bureau of Mines, Department of the Interior, Washington, D.C.
Defendants

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

1. This court has jurisdiction over this matter by virtue of 28 USC Section 1331, 28 USC Section 1337, and 28 USC Section 2201. The amount in controversy is in excess of $10,000 exclusive of interest and costs.

2. Plaintiff National Independent Coal Operator's Association is an association comprising a membership of more than 400 producers and processors of bituminous coal in the states of Alabama, Tennessee, Kentucky, West Virginia, Virginia, Iowa and Illinois. It brings this action on its own behalf and on behalf of its members. The individually named plaintiffs herein are or have been owners and operators of underground bitumonous coal mines and coal processing facilities. They are predominantly small and medium size business firms, and are members of the National Independent Coal Operator's Association. They bring this action on their own behalf and as representatives of a class of coal mine operators similarly affected by the unlawful and wrongful actions of defendants as hereinafter described.

3. Plaintiffs' coal mining operations are subject to the Federal Coal Mine Health and Safety Act of 1969, (Title 30 USC, Section 801), hereinafter referred to as the Act, and regulations issued by the Secretary of the Interior in accordance with the provisions of that Act.

4. Defendant Rogers C. B. Morton is Secretary of the Interior of the United States, and as such has responsibility for the administration and enforcement of the Act. His responsibilities in this connection have been delegated by him to defendant Elburt F. Osborn, Director of the Bureau of Mines of the Department of the Interior, and to other subordinate officers and employees of the Department of the Interior, including defendants Edward Failor and Everett Turner who have been delegated the responsibility for determining and assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Act, as hereinafter described.

5. The Act provides in Section 109 (a) (1) thereof (30 USC Section 819) that the operator of a coal mine in which a violation occurs of a mandatory health and safety standard, or who violates any other provisions of the Act, "shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." Section 109(a) (1) further provides that in determining the amount of the penalty to be assessed in respect to any charged violation the Secretary shall consider a number of factors which include the operator's history

of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

6. The Act further provides in Section 109(a) (3) that, "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under Section 105 of this title. Any hearing under this section shall be of record and shall be subject to Section 554 of Title 5 of the United States Code." (Underscoring added.)

7. On January 16, 1971, defendant Morton's predecessor as Secretary of the Interior adopted and caused to be published (Code of Federal Regulations, Title 30, Part 100) a procedure to be followed by the Bureau of Mines in assessing civil penalties under the Act, which procedure purported to be issued under and in accordance with Section 109 of the Act. A copy of said civil penalty procedure is attached here as Exhibit A to this complaint.

8. The aforesaid Part 100 civil penalty assessment procedure was adopted by defendant Morton's predecessor without complying with the Notice and Hearing Procedures of the Administrative Procedure Act, 5 USC Section 553, and contrary to the express requirements of the Act. Notwithstanding that such civil penalty assessment procedure was not adopted and promulgated in accordance with the requirements of Law, defendant Morton has authorized and directed defendants Osborn, Failor and Turner to proceed to apply and carry out such procedure, as explained in further detail below.

9. For the purpose of carrying out the aforesaid Part 100 civil penalty assessment procedure defendants have employed and appointed at the Washington, D.C. headquarters of the Bureau of Mines a staff of assessment officers who have been assigned the duty of issuing proposed orders of assessment as described in Section 100.4 of said Part 100. In applying the aforesaid Part 100 civil penalty assessment procedure defendants and their delegated staff of enforcement officers have issued and caused to be served upon plaintiffs proposed civil penalty assessments which in many instances are based upon inaccurate and erroneous reports of alleged violations of safety and health standards, which make no reasonable or rational distinction between small mines and large mines, and which fail completely to take into account any of the factors which are required to be considered in determining civil penalties under the express language of Section 109 of the Act, as hereinabove described.

10. The assessment officers described in the foregoing paragraph who have been charged with making civil penalty assessments by defendants Morton, Osborn, Failor and Turner perform their function of making assessments without having available to them adequate or sufficient information which would enable them to determine whether a particular cited violation of the health and safety standards of the Act has in fact occurred, or the conditions and circumstances contributing or giving rise to any such violation, and without first giving the operator charged an opportunity to answer or respond to the cited violation. In a great majority of instances the only information these assessment officers have available to them is the fact that a notice of violation was issued by a mine inspector in the course of making an inspection of the mine in question. They do not have information respecting the operator's history of previous violations, whether the operator was negligent, and, if so, to what degree, or the extent to which he made a good faith effort to comply with the standards of the Act or to achieve rapid compliance after notification of a violation, the gravity of the violation, or the effect of the civil penalty assessment on the operator's ability to continue in business; all of which factors are specified in the Act as factors which must be taken into account by the Secretary of the Interior in determining the amount of any civil penalty to be assessed under the Act for any violation of a mandatory safety or health standard.

11. In issuing and causing to be issued the aforesaid civil penalty assessment notices to plaintiffs and other

small and medium size coal operators, defendants and their agents and employees have acted in a highly arbitrary, irresponsible and unreasonable manner in the following respects:

a. They have ignored the express and specific provision of Section 109(a) (3) of the Act that, "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein that the penalty be paid."

b. In determining the amounts proposed to be assessed as civil penalties they have failed and refused to take into account, as required by the express language of Section 109 of the Act, each and every one of the following factors:

(1) the operator's history of previous violations,

(2) the appropriateness of such penalty to the size of the business of the operator charged,

(3) whether the operator was negligent,

(4) the effect on the operator's ability to continue in business,

(5) the gravity of the violation, and

(5) the demonstrated good faith of the operator in attempting to achieve compliance after notification of a violation.

c. In many instances civil penalty assessment notices are issued even though the conditions existing in a mine are not in violation of any mandatory health or safety requirement or other provision of the Act, and the

operator has in fact fully complied with applicable health and safety standards under the Act and regulations.

d. In many instances civil penalty assessment notices are issued for insignificant and insubstantial infractions which have nothing whatever to do with health and safety of miners.

e. In many instances civil penalty assessment notices are issued notwithstanding that the charged violation was corrected immediately upon being discovered and before it could have created any hazard to the health and safety of persons in the mine.

f. In many instances civil penalty assessment notices are issued notwithstanding that the mine operator has made a diligent effort to obtain material and equipment necessary to meet the mandatory health and safety standards of the Act, but, in spite of such diligent efforts, has been unable to do so.

g. In many instances the amounts assessed as proposed civil penalties are grossly disproportionate to the nature of the violation charged.

h. In many instances the amounts assessed as proposed civil penalties against small mine operators are equal to or in excess of amounts assessed against large mine operators for the same or comparable violations of the mandatory health and safety standards of the Act.

i. No consistent or rational pattern of assessments is followed in respect to violations of particular safety or health standards in mines of comparable size and economic circumstances, with the result that one mine may be assessed a substantially higher penalty than another without any explanation of justification for the disparity.

j. The dominant factor in determining the amount of a penalty assessment appears to be the whim or emotional disposition of the particular assessment officer making the assessment at the particular time the assessment is made, since no objective criteria or standards have been established or promulgated.

k. In a great many instances the amounts assessed as proposed civil penalties are so excessive that plaintiffs and other small and medium size operators can not possibly pay them and remain in business, and, in fact, a number of plaintiffs herein have been compelled to discontinue their mining operations because of such excessive penalty assessments and the threat that further excessive penalties will be assessed against them.

12. In exercising the authority given to them pursuant to Section 104(a) of the Act to order the withdrawal of personnel from underground coal mines where conditions of imminent danger are found to exist defendants and their employees and agents have grossly abused their discretion by arbitrarily, unreasonably and irresponsibly issuing such withdrawal orders in many situations in which (a) conditions in a mine do not in fact present a threat of imminent danger, (b) the operator is in the process of correcting a condition which might reasonably be expected to present a threat of imminent danger, and (c) the operator has on his own initiative already withdrawn all personnel from the mine, and the mine is closed. Further, defendants and their agents and employees have failed to apply any consistent or objective standards as to what constitutes imminent danger, with the result that a condition which may be found reasonably safe in one mine is classified

as imminent danger in another. As a result of such inconsistency and lack of objective standards plaintiffs and other coal operators are confused and confounded, and the entire coal industry is permeated with an atmosphere of uncertainty and anxiety respecting the policies and practices of defendants and their employees and agents pursuant to their authority to issue Section 104(a) withdrawal orders.

13. Defendants have further abused their discretion, and acted contrary to the intent and purpose of the Act, by directing that the civil penalty to be assessed in any situation in which a Section 104(a) withdrawal order is issued shall be in an amount not less than $5,000, and ranging up to $10,000. In numerous instances defendants and their delegated staff of assessment officers have issued proposed civil penalty assessment notices to plaintiffs and other coal operators in amounts of $5,000 or more based upon withdrawal orders which were wrongfully or erroneously issued, or where the withdrawal order was based upon an actual condition of imminent danger but such condition was due to natural causes beyond the control of the mine operator and not due to his fault or negligence, and the imminent danger condition was not due in any manner to a failure of the operator to comply with the mandatory safety and health standards of the Act and regulations.

14. Under the aforesaid Part 100 civil penalty assessment procedure a mine operator who receives a proposed order of assessment is required to file a written protest to such proposed order within 15

working days from the date of its receipt, and upon his failure to do so he is deemed to have waived his rights to formal adjudication and opportunity for hearing as provided in Section 109(a)(3) of the Act. Although Part 100 thus purports to provide an opportunity for the operator charged to seek formal adjudication, this procedure, for the reasons described hereinafter, effectively denies the operator his statutory right to a hearing, and is designed to discourage him from pursuing the specified adjudicatory procedures. Within the context of the aforesaid Part 100 procedure a formal adjudication hearing becomes merely a *post facto* step which occurs after the initial notice of penalty assessment is served upon the operator, as contrasted with the type of prior hearing contemplated by and expressly called for in the Act, and imposes upon the respondent operator the burden of disproving the existence of a violation which the Secretary of the Interior and his agents and employees have already determined to have occurred, and for which they have already assessed a proposed penalty. Further, in many instances where an operator has requested formal adjudication by the Office of Hearings and Appeals of the Department of Interior pursuant to the Pact 100 civil penalty assessment procedure substantially higher penalties are ultimately imposed. As a result plaintiffs and other small and medium size coal operators have been put on notice that by requesting an adjudicatory hearing under the Part 100 procedure they run a very high risk of receiving penalties even greater than those administratively proposed by the assessment officers. Because of their fear of receiving such higher penalties plaintiffs and other small and medium size coal

operators have been induced and constrained to forego requesting such formal adjudicatory hearings, and, in effect, are given no practical choice other than to let the administratively proposed orders of assessment become final orders. Upon becoming final, such orders are entered on the official records of the Bureau of Mines as conclusive evidence of the operator having violated the mandatory standards of the Act, are required to be taken into account and considered in connection with any further proceedings for the assessment of civil penalties for violations subsequently charged against the mine operator, and are subject to collection proceeding brought against the operator by the United States Government.

15. For the foregoing reasons the Part 100 civil penalty assessment procedure adopted and applied by defendants is unreasonable and oppressive, and is not in compliance with the intent and the express language of the Act. The unlawful and arbitrary manner in which defendants and their delegated staff of enforcement officers are and have been applying the aforesaid Part 100 civil penalty assessment procedure has directly resulted in forcing many small and medium size coal operators, including a number of plaintiffs herein, to discontinue or abandon their mining operations; has threatened the continued existence of the small and medium size coal mine operations remaining in business; has caused and is causing loss of employment for thousands of coal miners; and has caused and is causing economic havoc throughout the coal industry and the communities and regions which are dependent upon the coal industry for their economic livelihood. In the two

years that have elapsed since the effective date of the Act, and the regulations adopted thereunder, almost 2000 small and medium sized underground bituminous coal mines have been forced to permanently abandon their operations, and the accelerated rate at which the remaining small and medium size mines are currently being abandoned is such that this important segment of the bituminous coal industry is threatened with total extinction within the next two years. If defendants are permitted to continue to follow and apply the aforesaid Part 100 civil penalty assessment procedure plaintiffs and other small and medium size operators of underground bituminous coal mines will suffer irreparable injury and harm for which they will have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray this Honorable Court to:

1. Declare that the part 100 civil penalty assessment procedure, in its concept and its operation and effect, denies plaintiffs substantive rights guaranteed by the Constitution, and by the Act itself, is contrary to statutory law, and unlawfully threatens plaintiffs and other coal operators with deprivation of their property without due process of law;

2. Issue an injunction restraining defendants from continuing to administer or apply the provisions of the aforesaid Part 100 civil penalty assessment procedure; and

3. Provide such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ John L. Kilcullen
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Washington, D.C. 20036
659-1600

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1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

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Washington, D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, et al.,

Plaintiffs

v.

ROGERS C. B. MORTON, Secretary of the Interior of the United States, Department of the Interior, Washington, D.C. 20240;

) Civil Action No. 397-72

ELBURG G. OSBORN, Director of the United States Bureau of Mines, Department of the Interior, Washington, D.C. 20240;

EDWARD FAILOR, Chief, Office of Assessments and Enforcement Compliance, United States Bureau of Mines, Department of the Interior, Washington, D.C. 20240; and

EVERETT TURNER, Assessment Officer, United States Bureau of Mines, Department of the Interior, Washington, D.C. 20240;

Defendants.

DEFENDANTS' ANSWER TO COMPLAINT

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

This Court lacks jurisdiction over the subject matter of this action because Plaintiffs have failed to exhaust their administrative remedies.

Third Defense

There is a lack of equity jurisdiction in this Court since Plaintiffs have an adequate remedy at law.

Fourth Defense

For their Answer to the numbered paragraphs of the Complaint, Defendants show the Court as follows:

1. Paragraph 1 is a conclusion of law which does not necessitate an answer; to the extent which it may be deemed an allegation of fact, it is denied.

2. Defendants lack information sufficient to form a belief as to the truth of the allegations in paragraph 2, and, accordingly, deny the same.

3. The allegations in paragraph 3 are admitted.

4. The allegations in paragraph 4 are admitted.

5. In reciting in paragraph 5 of the Complaint, the provisions of the first sentence of Section 109(a) (1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §819(a) (1). Plaintiffs have left out an exception. Said sentence, with the exception included, reads in its entirety as follows: "The operator of a coal mine in which a violation occurs of a mandatory health

or safety standard or who violates any other provision of this Act, except the provisions of title 4 (underscoring added), shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation." Except for the foregoing, Defendants admit the allegations in paragraph 5 of the Complaint.

6. The allegations in paragraph 6 are admitted.

7. The allegations in paragraph 7 are admitted.

8. The allegations in paragraph 8 are denied.

9. The allegations in paragraph 9 are denied.

10. The allegations in paragraph 10 are denied.

11. The allegations in paragraph 11 and each of its subparagraphs are denied.

12. The allegations in paragraph 12 are denied.

13. The allegations in paragraph 13 are denied.

14. The allegations in paragraph 14 are denied.

15. The allegations in paragraph 15 are denied.

16. Except as herein admitted, Defendants deny each and every allegation contained in the Complaint.

WHEREFORE, Defendants demand that the Com-

plaint be dismissed and for such other relief as may be just and proper.

/s/
Harold H. Titus, Jr.
United States Attorney
for the District of Columbia

/s/
Joseph M. Hannon
Assistant United States Attorney

/s/
Robert M. Werdig
Assistant United States Attorney
Attorneys for Defendants

OF COUNSEL:

/s/J. Philip Smith
J. Philip Smith
Assistant Solicitor
Mine Health and Safety
U.S. Department of Interior
Washington, D.C. 20240
Telephone: (202) 343-6221

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	
	)	Civil Action No.
	)	397-72
ROGERS C. B. MORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

MOTION OF DEFENDANTS TO DISMISS THE ACTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants, by their counsel, the United States Attorney for the District of Columbia, move the Court to dismiss the action on the grounds that the complaint together with defendants' Exhibits 1 through 4 indicate there is no genuine issue of any material fact and defendants are entitled to judgment as a matter of law.

HAROLD H. TITUS, JR.
United States Attorney

ARNOLD T. AIKENS
Assistant United States Attorney

ROBERT M. WERDIG, JR.
Assistant United States Attorney

F COUNSEL:

Philip Smith
ssistant Solicitor
ine Health and Safety
.S. Department of Interior

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al.,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION
ROGERS C. B. MORTON, Secretary of the Interior of the United States, Department of the Interior, Washington, D C. 20240;	)	NO. 397-72
ELBURT G. OSBORN, Director of the United States Bureau of Mines, Department of the Interior, Washington, D C. 20240;	)	
EDWARD FAILOR, Chief, Office of Assessments and Enforcement Compliance, United States Bureau of Mines, Department of the Interior, Washington, D. C. 20240; and	)	
EVERETT TURNER, Assessment Officer, United States Bureau of Mines, Department of the Interior, Washington, D. C. 20240	)	
Defendants	)	INTERROGATORIES

TO: Robert M. WERDIG, Assistant United States Attorney, United States Court House, Constitution

Avenue and John Marshall Place, Washington, D. C. 20001 and J. PHILIP SMITH, Assistant Solicitor, Mine Health and Safety, United States Department of Interior, Washington, D. C. 20240, Attorneys for Defendants:

Plaintiffs request that defendant EVERETT TURNER, ASSESSMENT OFFICER, BUREAU OF MINES, UNITED STATES DEPARTMENT OF THE INTERIOR, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

(1) State the number of notices of Violations and Orders of Withdrawal that have been received by the Office of Assessments and Compliance Assistance from District and sub-District offices of the U. S. Bureau of Mines for alleged violations of the mandatory health and safety standards established by the Federal Coal Mine Health and Safety Act of 1969 (Title 30 USC Section 801), and regulations issued thereunder, since the effective date of the Act on March 30, 1970.

(2) Of the figure listed in response to Interrogatory Number 1, state the total number of Notices of Violations and Orders of Withdrawal with respect to which Proposed Orders of Assessment of civil penalties have been issued by you in your capacity as Assessment Officer or by those acting on your behalf since the effective date of the regulations entitled *Part 100 - Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969* (Fed. Reg., Vol. 36, No. 11) on January 16, 1971.

(3) State the total amount in dollars of the Proposed Orders of Assessment of civil penalties issued by you pursuant to the Part 100 Civil Penalty Assessment

Regulations as referred to in Interrogatory Number 2.

(4) a) State the total number of Section 104(a) imminent danger Withdrawal Orders received by your office since April 1, 1971, and attach a copy of each such Order.

b) State the total number of such Section 104(a) imminent danger Withdrawal Orders with respect to which you have issued Proposed Orders of Assessment of civil penalties pursuant to the Part 100 Regulations, and attach a copy of each such Proposed Order of Assessment.

c) If any such Proposed Orders of Assessment have been amended attach a copy of each such amended Proposed Order of Assessment.

/s/ John L. Kilcullen
John L. Kilcullen

/s/ Peter F. Healey
Peter F. Healey
Attorneys for Plaintiffs

1250 Connecticut Avenue, N.W.
Suite 707
Washington, D.C. 20036
Telephone: 202/659-1600

Of Counsel:

GALL, LANE, POWELL & KILCULLEN
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Dated: August 2, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al.,	)	
PLAINTIFFS	)	CIVIL ACTION
	)	NO. 397-72
v.	)	
ROGERS C. B. MORTON, et al.,	)	
DEFENDANTS	)	

ANSWERS TO INTERROGATORIES

Everett Turner, Assessment Officer, Bureau of Mines, United States Department of the Interior, being first duly sworn, according to law, answers the interrogatories of plaintiffs as follows:

(1) A total of 115,000 Notices of Violations and Orders of Withdrawal have been received by the Office of Assessments and Compliance Assistance from District and Subdistrict offices of the United States Bureau of Mines, since March 30, 1970, to and including June 30, 1972.

(2) A total of 92,334 Notices of Violation and 5,131 Orders of Withdrawal were processed with respect to which Proposed Orders of Assessment of civil penalties were issued by the Assessment Office, since January 16, 1971, through June 30, 1972.

(3) The total amount in dollars of the Proposed Orders of Assessment for civil penalties issued by the Assessment Office pursuant to the Regulations through June 30, 1972, was:

Original Proposed Assessments $20,187,695.00
Adjusted Proposed Assessments $16,344,646.00

(4) (a) and (b) Orders of Withdrawal and Notices of Violation citing violations of the Act or Regulations, under Sections 104(a), 104(b), 104(c)(1) and 104(c)(2) of the Act, have been issued since September of 1971 by utilizing one form. When these forms are received in the Assessment Office the file clerk, who is not required to study the form to determine what type of an Order of Withdrawal such as 104(1), 104(b), 104(c)(1), or 104(c)(2) has been issued, inserts them into the inspection file. They are not separated. With approximately 5,000 inspection files averaging six divisions per file or 30,000 divisions, a response to these interrogatories is not feasible and would be unnecessarily burdensome upon defendants.

(4) (b) and (c) As a result of a letter of August 8, 1972, from plaintiffs' counsel, my office has permitted plaintiffs' counsel to have access to and to copy all documents referred to in Interrogatories numbered 4(b) and (c).

/s/ Everett Turner
Everett Turner
Assessment Officer

Subscribed and sworn to before me this 29th day of August, 1972.

/s/ Margaret B. Burton
Notary Public

[illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al. Plaintiffs,	FILED SEP 1 1972 JAMES F. DAVEY, Clerk
v.	CIVIL ACTION
ROGERS C. B. MORTON, Secretary of the Interior, et al. Defendants.	NO. 397-72

REQUEST FOR ADMISSIONS OF FACTS

TO: ROBERT M. WERDIG, Assistant United States Attorney, United States Court House, Constitution Avenue and John Marshall Place, Washington, D.C. 20001 and J. PHILIP SMITH, Assistant Solicitor, Mine Health and Safety, United States Department of Interior, Washington, D.C. 20240, Attorneys for Defendants;

Plaintiffs, pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, request defendant Everett Turner, Assessment Officer, Bureau of Mines, United States Department of the Interior, to admit for the purpose of this action only the truth of the following facts:

1. No guidelines or standards defining the six criteria set forth in Sections 100.2 and 100.4 of the Part 100 Civil Penalties Regulations (30 CFR Part 100) have been used or are used by me in determining and making proposed assessment orders and amended assessment

orders for alleged violations of the Federal Coal Mine Health and Safety Act of 1969 (30 USC Section 801 *et seq.*)

2. No guidelines or standards respecting the weight and consideration to be given to each of the six criteria set forth in the Part 100 Regulations have been or are used by me in determining and making proposed assessment orders and amended assessment orders for alleged violations of the Act.

3. Mine operators who are issued proposed assessment orders and amended assessment orders are not furnished with explanatory material regarding the manner in which each of the six criteria set forth in the Part 100 Regulations are applied by me in determining and making such assessment orders or with regard to the weight and consideration given to each of the six criteria.

4. No documentation descriptive of the manner in which each of the six criteria set forth in the Part 100 Regulations is considered, weighed, or applied by me in determining and making proposed assessment orders and amended assessment orders is incorporated or included in the files or worksheets of the Office of Assessments and Compliance Assistance.

5. No financial data or information pertinent to the effect of proposed assessments on the ability of operators to continue in business is considered or reviewed by me prior to the issuance of initial proposed assessment orders.

6. No written findings of fact that violations cited in proposed assessment orders or amended assessment orders are made by me concurrently with the determination and issuance of such assessment orders

and no such findings of fact are served on mine operators who are issued such proposed and amended assessment orders.

/s/ John L. Kilcullen
John L. Kilcullen

/s/ Peter F. Healey
Peter F. Healey
Attorneys for Plaintiffs
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 202-659-1600

Of Counsel:

GALL, LANE, POWELL & KILCULLEN
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dated: September 1, 1972

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al., Plaintiffs,	)	
v.	)	Civil Action No. 397-72
ROGERS C. B. MORTON, et al., Defendants.	)	

ANSWERS TO REQUESTS FOR ADMISSIONS

Defendants by their counsel, the United States Attorney for the District of Columbia, submit the following answers in response to plaintiff's Request for Admissions.

1. To plaintiffs' Request for Admission No. 1:

> "1) It is admitted that no *written* guidelines or standards other than those contained in the Act and in 30 CFR Part 100 are used in determining or making proposed assessment orders. However, oral guidelines are provided staff assessors respecting how to evaluate the six statutory criteria and how to utilize all available information concerning the particular operator or miner involved and the violation alleged.

2. To plaintiffs' Request for Admissions No. 2:

See No. 1.

3. To plaintiffs' Request for Admission No. 3:

"3) Mine operators are not ordinarily furnished with written explanatory material regarding the manner in which each of the six statutory criteria are applied in determining and making proposed assessment orders.

Further to the best of Mr. Everett Turner's recollection, no mine operator has ever asked for a written explanation. However, on numerous occasions, Mr. Turner met with mine operators and/or their representatives, in person, to orally explain to them, the manner in which each of the six statutory criteria was applied by him in a given case.

4. To plaintiffs' Request for Admission No. 4:

Denied.

5. To plaintiffs' Request for Admission No. 5:

Denied.

6. To plaintiffs' Request for Admission No. 6:

Denied.

HAROLD N. TITUS, JR.
United States Attorney

ARNOLD T. AIKENS
Assistant United States Attorney

ROBERT M. WERDIG, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Answers to Requests for Admissions, has been made upon plaintiffs by mailing a copy thereof to attorney for plaintiff, John L. Kilcullen, Esq. 1250 Connecticut Avenue, N. W. Washington, D.C. 20036 on this 2nd day of October 1972.

ROBERT M. WERDIG, JR.
Assistant United States Attorney

OF COUNSEL:

J. Philip Smith
Assistant Solicitor
Mine Health and Safety
U.S. Department of Interior

Final Order/No. request for Adj.

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

CERTIFIED MAIL
Return Receipt Requested

FILED
NOV - 6 1972
JAMES F. DAVEY, Clerk

Re: Mine:

Case No.

Proposed Order ( )
Amended Order ( )
Reissued Order ( )

Gentlemen:

No request for formal adjudication having been filed within twenty (20) days of your receipt of the above-captioned Order dated _____, you are hereby notified that the said Order has now been entered as the Final Order of the Secretary. This Order is issued pursuant to Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819) and the regulations promulgated thereunder as set forth in Title 30, Code of Federal Regulations, Part 100.

Unless payment of the assessment in the amount of _____ is made within ten (10) working days of the receipt of this letter, this matter will be referred to the Office of the Solicitor for the enforcement of said payment in an appropriate district court of the United States. In this connection, we call your attention to Section 109(a)(4) of the Federal Coal Mine Health and Safety Act of 1969, (30 U.S.C. 819), which sets forth in detail the method of enforcement of the Final Order of the Secretary.

Payment of the assessment should be made in the form of a check or money order made payable to the U. S. Bureau of Mines and mailed to:

Chief, Division of Finance
U. S. Bureau of Mines
Building 20
Denver Federal Center
Denver, Colorado 80225

If full payment for the case has been made, please disregard this letter.

Sincerely yours,

Everett Turner

Everett Turner
Assessment Officer

cc: Case File
Reading File

APPENDIX DOCUMENT "E"

United States Department of the Inferior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: _____
Operator

Case No. _____

FILED
NOV - 6 1972
JAMES F. D.

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE _____ PROPOSED ORDER OF ASSESSMENT DATED _____ DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Everett Turner
ASSESSMENT OFFICER

APPENDIX DOCUMENT "H"

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

IN THE MATTER OF:

Re: Mine:

Case No:

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration, it is hereby found that the below listed violations have, in fact, occurred, and consideration having been given to all available information, including the operator's history of previous violations, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of the violation; it is hereby ordered that _____ be and the same is hereby assessed a civil penalty in the amount of _____ ($) for the following violations:

Violation No.	Date Issued	Violation	Assessment

FILED
NOV - 6 1972
JAMES F. DAVEY, Clerk

Total Assessed Amount _____

Dated at Washington, D. C.
and entered as the Proposed
Order of Assessment

_____
Assessment Officer

cc: OMCA Case File
ADP Denver
Reading File

APPENDIX DOCUMENT "N"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
WASHINGTON, D.C.

IN THE MATTER OF:

Re: Mine:

Case No:

PROPOSED ORDER OF ASSESSMENT

The above-captioned matter having come on for consideration and verification having been given to all available information, including the operator's history of previous violation, the appropriateness of the proposed assessment to the size of the business of the operator charged, whether the operator was negligent, the effect of the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged:

it is hereby ordered that _____ be and the same is hereby assessed a civil penalty in the amount of _____ ($) for the following violation:

Violation No:	Date Issued:	Violation:	Assessment:

BEST COPY AVAILABLE

Total Assessed Amount _____

FILED
NOV - 6 1972
JAMES F. Davey

_____
Assessment Officer

Dated at Washington D. C.
and entered as the Proposed
Order of Assessment

cc: OMCA Case File
ADP Denver
BOM Files

APPENDIX DOCUMENT "O"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMIBA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al. Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 397-72
ROGERS C. B. MORTON, Secretary of the Interior, et al. Defendants.	)	INTERROGATORIES

TO: ROBERT M. WERDIG, Assistant United States Attorney, United States Court House, Constitution Avenue and John Marshall Place, Washington, D. C. 20001 and J. PHILIP SMITH, Assistant Solicitor, Mine Health and Safety, United States Department of Interior, Washington, D. C. 20240, Attorneys for Defendants:

Plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure, request that defendant Rogers C. B. Morton, Secretary of the Interior, United States Department of the Interior, answer under oath the following interrogatories:

1. (a) State the total number of applications pursuant to Section 105 of the Federal Coal Mine Health and Safety Act of 1969 (30 USC Section 801 *et seq.*) that have been filed with the Office of Hearings and Appeals for review of withdrawal orders issued under Section 104 of the Act, such figure to include applications for review of terminated or modified closure orders.

(b) State the total number of such Section 105 cases in which final decisions have been made.

(c) State the average length of time which has elapsed from the date of the filing of such applications for review of withdrawal orders and final decisions thereon.

(d) State the total number of such Section 105 review cases which are pending at this time (i.e., as to which no final decision has been made).

2. (a) State the total number of civil penalty assessment cases under Section 109 of the Act that have been referred to the Solicitor's office of the Department of the Interior as the result of petitions for hearing and formal adjudication filed with the Office of Assessments and Compliance Assistance by mine operators pursuant to Section 100.4(i) of the Part 100 Civil Penalties Assessment Regulations (30 CFR Part 100).

(b) State the total number of Section 109 cases that the Solicitor's office has filed with the Office of Hearings and Appeals pursuant to petitions for hearing and formal adjudication filed by mine operators.

(c) State the total number of Section 109 cases as to which mine operators have filed petitions for hearing and formal adjudication directly with the Office of Hearings and Appeals pursuant to Section 100.4 of the Part 100 Civil Penalties Assessment Regulations, as amended June 15, 1972.

(d) State separately the total number of Section 109 cases in which hearing officers have conducted hearings and rendered decisions and the average length of time such hearings have involved.

(e) State separately the average length of time which has elapsed from the date of the operator's

petition for hearing until the date of the hearing officer's decision.

(f) State the total number of Section 109 cases which are currently pending adjudication (1) by hearing officers, and (2) by the Board of Mine Operations Appeals.

3. (a) State the number of decisions of hearing officers in Section 109 proceedings which have been reviewed by the Board of Mine Operations Appeals.

(b) State the number of such cases in which the Board has rendered final decisions, and the average length of time which has elapsed from the date of the hearing officer's decision and the final decision of the Board in such cases.

(c) State the total number of Section 109 cases decided by the Board and hearing officers which have been referred to the Justice Department for institution of enforcement proceedings in appropriate federal district courts.

(d) State separately the number of proceedings which have been filed in appropriate federal district courts by the Justice Department to enforce decisions of the Board and hearing officers in Section 109 cases, and total amount of civil penalties as to which enforcement has been sought in such cases.

4. (a) State both the total number of penalty assessment cases wherein the proposed or amended assessment made by the Office of Assessments and Compliance Assistance has become the final Assessment Order of the Secretary, and the total monetary amounts of all such final assessment orders.

(b) State both the total number and the total amount of such final Assessment Orders of the

Secretary which have been referred to the Justice Department for the institution of enforcement proceedings.

(c) State both the total number and the total monetary amount of such final Assessment Orders of the Secretary as to which the Justice Department has filed petitions for enforcement in appropriate federal district courts.

/s/ John L. Kilcullen
John L. Kilcullen

/s/ Peter F. Healey
Peter F. Healey
Attorneys for Plaintiffs

1250 Connecticut Avenue, N. W.
Suite 707
Washington, D. C. 20037
(202/659-1600)

Of Counsel:

GALL, LANE, POWELL & KILCULLEN
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Dated: September 14, 1972

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATORS' ASSOCATION, et al., Plaintiffs,	)	Civil Action No. 397-72
v.	)	
ROGERS C. B. MORTON, Secretary of the Interior, et al., Defendants.	)	

ANSWERS TO INTERROGATORIES

Everett Turner, being first duly sworn according to law, deposes and says, upon his personal knowledge and belief, he gives the following answers to interrogatories of plaintiffs', dated September 14, 1972:

1(a) 2,942[1]

1(b) 2,365

1(c) My office does not keep statistics based upon the length of time a case is in my office pending decision. Obviously the time varies greatly from case to case.

1(d) 577

2(a) The total number of penalty cases referred for hearing and formal adjudication as of August 31, 1972, is 2,354.

[1] My office does not separate Applications for Review Orders of Withdrawal from Applications for Review Notices of Violation, rather the §105 Applications for Review are intermingled.

2(b) 1,581[2]

2(c) 964

2(d) 619 decisions. However, only 132 are decisions on the merits after hearing; the remainder are dismissals and settlements.

2(e) See the answer to 1(c) above. However, to date none of the operators' petitions for hearing filed since June 15, 1972, have gone to hearing.

2(f) Hearing Examiners - 1,935

3(a) 21

3(b) 17. See the answer to 1(c) in regard to average length of time of decisions.

3(c) 22 (7 in process)

3(d) The information sought by interrogatory 3(d) is unavailable in this office. Plaintiffs are referred to John L. Murphy, Chief, Administrative Regulations Section, Criminal Division, U. S. Department of Justice.

4(a) (1) The total number of penalty cases that have become the final Assessment Order of the Secretary as of August 31, 1972, is 2,480.

(2) The total amount for cases becoming the final Assessment Order of the Secretary is $2,901,434.00.

4(b) (1) The total number of penalty cases that have been referred to the Justice Department for institution of enforcement proceedings as of August 31, 1972, is 958.

(2) The total amount for cases that have been referred to the Justice Department as of August 31,

[2] Figure includes 62 civil penalty cases received in November through December 1970 which were not processed through the Assessment Office, Bureau of Mines.

1972, is $942,100.00.

4(c) See 3(d) above.

Everett Turner
Assessment Officer

Subscribed and sworn to before me this ____ day of _____, 1972.

Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 327-72
ROGERS C. B. MORTON, Secretary of the Interior, et al., Defendants.	)	

PLAINTIFFS OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND PLAINTIFFS CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs herewith oppose defendants' "Motion to Dismiss or in the Alternative, For Summary Judgment," and Move the Court for summary judgment in their favor on grounds that the Complaint herein properly states a cause of action for the relief requested, there exist no genuine issues of material fact, and plaintiffs are entitled to judgment as a matter of law.

John L. Kilcullen

John L. Kilcullen

Attorney for Plaintiffs
National Independent Coal
Operator's Association, et al.

Of Counsel:

Gall, Lane, Powell and Kilcullen
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Telephone: (202) 659-1600

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